

REMARKS

Claims 1-10, and 12-26 are in the application. Claims 13, 25 and 26 stand withdrawn pursuant to an election made with reservation of the right to prosecute the presently non-elected Claims. Claims 7, 8 and 9 have been cancelled. New Claim 27 has been added and is dependent on Claim 10. New Claim 28 has been added and is dependent on Claim 5.

Claims 7, 9, 12, 16, 17, 19, 22 and 24 are objected to.

The disclosure is objected to because there is no Claim 11 in the application and Claims 12, 16-17, 19, 22 and 24 are dependent on Claim 11. As noted, there is no Claim 11 in the present application. By the present response, Claims 12, 16-17, 19, 22 and 24 have been amended to depend from Claim 10 or an appropriate other Claim which is dependent on Claim 10. By these amendments, it is submitted that these Claims are no longer objectionable.

Claim 7 stands rejected under 35 USC § 112, second paragraph as being indefinite on the basis that the term "Plexar" is a trade name and therefore renders the Claim indefinite. Claim 7 has been cancelled.

Claim 9 stands rejected under 24 USC § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 9 has been cancelled.

Claims 1-7, 9-10, 12 and 15-24 stand rejected under 35 USC § 102(b) as being anticipated by Gibbons et al. In support of this basis for rejection of these Claims, the Examiner states that with respect to Claims 1-3, 5, 7, 9 and 12, Gibbons et al. disclose:

- (1) a barrier laminate (oxygen impermeable laminate, column 4, lines 57-61, comprising
 - (a) paperboard substrate (therefore having a first surface and second surface, column 4, lines 57-68),
 - (b) layer of polyolefin applied directly onto the second surface of the paperboard substrate (low density polyethylene; column 4, lines 67-68 ; column 5, lines 1-9; Figure 1),
 - (c) a first layer of polyamide which is an abuse resistant polymer, applied directly onto the first surface of the paperboard substrate (abuse resistant polymer comprising nylon; column 5, lines 2-9; Figure 1),
 - (d) a first oxygen barrier layer of ethylene vinyl alcohol applied directly onto the first polyamide layer (column 5, lines 9-10, column 7, lines 49-57; Figure 1),

- (e) a caulk layer applied directly on the barrier layer (column 5, lines 12-16; Figure 1),
- (f) a polyolefin layer applied onto the caulk layer as the innermost and product contact layer (lastly coated thereon therefore in contact with any product contained by the laminate,
- (g) a layer of low density polyethylene, (column 5, lines 15-19),
- (h) additional layers of abuse resistant polymer, tie layer and oxygen barrier material, (column 8, lines 34-38) and therefore disclose
 - (i) a second layer of polyamide
 - (j) a first tie layer,
 - (k) a second oxygen barrier layer,
 - (l) a second tie layer comprising ethylene vinyl alcohol between the oxygen barrier layer and caulk layer of Figure 1.

The Examiner's attention is respectfully directed to the following comparison of the elements of Claim 1 of the present application and the elements identified by the Examiner as constituting anticipation of Claim 1 by Gibbons et al.:

<u>Claim 1</u>	<u>Examiner's Combination</u>
(1) a barrier laminate (a) paperboard substrate	a barrier laminate paperboard substrate
(b) layer of polyolefin applied to second surface of substrate	layer of polyolefin applied to second surface of substrate
(c) a first polyamide layer applied to first surface of substrate	a caulking layer applied to first surface of substrate
(d) a first oxygen barrier layer of EVOH applied directly onto the first polyamide layer	a first oxygen barrier layer of EVOH (applied to caulking layer, not to polyamide)
(e) a second polyamide layer	a caulk layer

- (f) a first tie layer applied directly on the second polyamide layer
- a polyolefin layer applied onto the caulk layer as the innermost and product contact layer (lastly coated thereon therefore in contact with any product contained by the laminate.
- (g) a second oxygen barrier layer selected from the selected from the group ethylene consisting of EVOH, polyvinyl alcohols, polyamides, polyesters, polyethylene terephthalates, polyolefins, cyclic olefin copolymers, polycarbonates, liquid crystalline polymers and blends thereof and blends of any of the foregoing group members with at least one member selected from the group consisting of desiccants, molecular sieves and cyclodextrins applied directly on the first tie layer,
- (h) a second tie layer applied on the second oxygen barrier layer
- additional layers of abuse resistant polymer, tie layer and oxygen barrier material, and therefore disclose a second layer of polyamide,
- a first tie layer, a second oxygen barrier layer
- (i) a polyolefin layer applied onto said second tie layer as the innermost and product contact layer,
- a second tie layer comprising ethylene vinyl alcohol between the oxygen barrier layer and caulk layer of Figure 1.

"... a finding of anticipation requires that the publication describe all of the elements of the claims, arranged as in the patented device"

C.R. Bard Inc. v M3 Systems, Inc. 48 USPQ2d 1225,1230

Citing: *Shearing v. Iolab Corp.* 24 USPQ2d 1133 (Fed. Cir. 1992); *Richardson v. Suzuki Motor Co.* 9 USPQ2d 1913 (Fed Cir. 1989); *Perkin-Elmer Corp. v. Computervision Corp.* 2211 USPQ 673 Fed. Cir. 1984.

In the present instance, Gibbons et al. fails to meet the Courts' test for anticipation.

Referring to the side-by-side comparison of the elements of Claim 1 and the Examiner's listing of the disclosures in Gibbons et al., it will be noted that the arrangement of the elements of Claim 1 and the Examiner's listed elements fails to identify "each of the elements" of Claim 1, "arranged as" in Applicant's Claim 1.

Specifically, as seen from the side-by-side comparison, elements (a) and (b) of Claim 1 appear to have like elements, which are like arranged, as in Claim 1. Element (c) of Claim 1 calls for a first polyamide layer applied directly on the first surface of the paperboard substrate. The Examiner states that Gibbons et al. disclose "a first layer of polyamide which is an abuse resistant polymer, applied directly onto the first surface of the paperboard substrate (abuse resistant polymer comprising nylon, column 5, lines 2-9; Figure 1)". However, at column 5, lines 2-9 and in Figure 1, Gibbons et al, disclose that a caulking layer is applied onto the polyamide layer. The first oxygen layer of Gibbons et al, is applied to the caulking layer (e.g. Surlyn, not directly to the polyamide layer. Thus, the reference cited by the Examiner fails to disclose the arrangement of elements (c) and (d) of Claim 1.

In the Examiner's combination, there is a caulk layer to be applied onto the first oxygen barrier layer. According to Gibbons et al., "(d)uring the heat-seal processes, the scoring processes, the side-seaming processes, and the folding, forming and filling steps, the particular caulking polymer resins, namely ionomer type resins, ethylene acrylic acid copolymers, ethylene methacrylate acid copolymers, ethylene vinyl acetate copolymers, ethylene methacrylate copolymers and the like have melt indexes which allow them to flow during the heat sealing processes (temperatures ranging from 250° F - 500° F). The particular selected resins act as a caulking agent to fill the channels produced during formation of the gable, or other type flat top, the fin-

sealed, or other conventional type bottom and the skived side seam. Consequently, each of those gap areas is caulked to prevent the transmission of oxygen therethrough." (emphasis supplied).

Contarily, the second polyamide layer of Claim 1 functions as an abuse resistance layer, e.g. nylon so that with respect to Applicants' claimed combination of layers, the Examiner's proposed combination further differs from that which is called for in Claim 1, and anticipation by Gibbons et al. fails again.

The Examiner's contention of anticipation further breaks down when attention is directed to element (h) of Claim 1. Element (h) of Claim 1 calls for a "tie layer applied directly to the second oxygen barrier layer". At this point, the Examiner merely notes that Gibbons et al. disclose "additional layers of abuse resistant polymer, tie layer and oxygen barrier material, and therefore disclose a second layer of polyamide, a first tie layer, a second oxygen barrier layer". There is no disclosure in Gibbons et al. noted by the Examiner which discloses an arrangement of these elements so that they constitute a "tie layer applied to the second oxygen barrier layer" (element (h) of Claim 1) and "a polyolefin layer, applied onto said second tie layer as the innermost and product contact layer" (element (i) of Claim 1). In fact, the Examiner fails to include a "polyolefin layer" in his concluding collection of elements which "therefore disclose "a second layer of polyamide, a first tie layer, a second oxygen barrier layer".

For the foregoing reasons, among others, it is respectfully requested that the rejection of Claim 1 as being anticipated by Gibbons et al., be withdrawn.

Claim 7 has been cancelled.

Claims 2-6, 9, 15, 18, 21, 23 and 25 are dependent, either directly or indirectly on Claim 1 and therefore inherit each of the elements, and their arrangement, set forth in Claim 1. Claim 9 has been cancelled. For the same reasons, among others, as set forth hereinabove in discussing Claim 1, it is submitted that Claims 2-6, 15, 18, 21, 23, and 25 are not anticipated by Gibbons et al. and withdrawal of their rejection under 35 USC §102(b) is respectfully requested.

With respect to Claim 10, the Examiner notes that "Gibbons et al disclose additional layers of abuse resistant polymer, tie layer and oxygen barrier material, and therefore also disclose an additional oxygen barrier layer comprising ethylene vinyl alcohol, which is a polyolefin, and an additional tie layer." The Examiner, however, fails to note that one or more of these elements are arranged as in the invention of Claim 10. On this basis alone, anticipation of Claim 10 by Gibbons et al. must fail.

As amended, Claims 12, 16, 17, 19, 20, 22 and 24 are dependent, either directly or indirectly on Claim 10 and therefore inherit each of the elements, and their arrangement,

Claim 8 stands rejected under 35 USC §103(a) as being unpatentable over Gibbons et al. Claim 8 has been cancelled.

New Claim 27 is directed to a sealed container and a perishable product contained therein constructed of a laminate according to claim 1, the product being cold filled into the container. Thus, Claim 27 is dependent from Claim 1 and its allowance is urged for the same reasons, among others, as set forth hereinbefore in discussing Claim 1.

New Claim 28 is directed to a container blank constructed from a laminate according to Claim 5. Claim 5 is dependent on Claim 1, hence Claim 28 is indirectly dependent on Claim 1. Allowance of Claim 28 is requested for the same reasons, among others, as set forth therein above in discussing Claim 1.

Reconsideration of the application and allowance of Claims 1-6, 10, 12, 15-24 and new Claims 27 and 28 are respectfully requested.

Respectfully submitted,
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